EMPLOYMENT TRIBUNALS

Claimant: Dr T William

Respondent: Lewisham and Greenwich NHS Trust

Heard at: Croydon Employment Tribunal in person
On: 13 to 17 June 2022

Before: Employment Judge Nash
Ms C Edwards
Mr S Corkerton

Representation
Claimant: Mr Maitland Jones of counsel
Respondent: Mr Moretto of counsel

JUDGMENT having been sent to the parties on 6 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Hearing

1. Following ACAS Early Conciliation from 22 July to 5 September 2020, the claimant brought her claim to the Tribunal on 17 September 2020.

2. At this hearing, the Tribunal heard from the claimant.

3. On behalf of the respondent, it heard from:-

   Dr D Harding, at the material time a Deputy Medical Director for Performance and Professional Standards;

   Ms H Peskett, a Divisional Director of Operations, Surgery and Cancer Care, who made the decision to sanction the claimant;

Ms R Backler, Director of Performance for the respondent, who heard the claimant's appeal against sanction; and

Ms K Anderson, the respondent's Director of Corporate Affairs, who heard the claimant's appeal against the grievance decision.

4. The Tribunal had sight of an agreed bundle to 2,703 pages. There were some delays during the hearing caused by discrepancies in the bundle and errors in the index. However, the tribunal and parties were able to have access to all documents.

The Claims

5. The only claim before the Tribunal was under section 47B Employment Rights Act 1996 - that the respondent had subjected the claimant to a detriment on the ground that she had made a protected disclosure.

Preliminary and Procedural Issues

<u>The Respondent's Recusal Application</u>

6. Before the start of the hearing the tribunal advised the parties on without prejudice matters. The parties sent a number of emails to the tribunal shortly before and on the first day of the hearing. Before the hearing one of the lay members opened and read an email from the claimant. In this email reference was made to a without prejudice offer by the respondent to the claimant including a specific sum. The member advised the judge and their fellow lay member. However, the conversation was halted. The judge heard the sum of money but the other lay member did not.

7. The tribunal invited the parties to make representations. The parties accepted that the email contained matters that were without prejudice. The respondent did not waive privilege. The respondent applied for the tribunal to recuse itself and for the hearing to be postponed. The claimant wished to proceed.

8. The Tribunal reminded itself that pursuant to the overriding objective and article 6 of the Human Rights Convention, the parties had a right to a fair hearing. This included the tribunal being free from bias, and the impression of bias, arising from the conduct of the hearing.

9. When considering questions of bias, the House of Lords in *Porter v Magill 2002 2 AC 357, HL*, stated at paragraph 103. " …The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". In *Ansar v Lloyds Bank TSB* [2006] UKEAT/0609/05/SM, Burton J confirmed that this was the correct test in a recusal application.

10. The Tribunal determined that a fair-minded and informed observer having considered the facts would not conclude that was a real possibility of bias for the

following reasons. The tribunal took judicial notice, which was not disputed by the parties, that settlement offers are not uncommon in the employment tribunal particularly in multi-day cases. The employment tribunal is a professional tribunal. It is well accustomed to, for whatever reason, being aware of material going to settlement negotiations and well accustomed to disregarding this. Only one member of the tribunal had read the email, and only two members of the tribunal, including the judge, were aware of the figure. The tribunal was confident that it could put the without prejudice material out of its mind and that a well-informed observer would expect it to do so.

11. This had the effect of avoiding an otherwise undesirable adjournment. Absent the without prejudice matter, there was no dispute that an adjournment would be contrary to the overriding objective. It would cause material prejudice to both parties as it would lead to considerable delay and expense. The hearing had already been postponed. It was nearly three years since the material events of the case. Any postponement of this five-day hearing would, considering the state of the tribunal list, be for a considerable time, most likely for over a year. The claimant and the respondent's six witnesses (NHS doctors and senior management) were present or had made arrangements to be present this week.

12. The tribunal advised the claimant that under no circumstances should she have disclosed without prejudice material to the tribunal. Although the tribunal did not have sight of other emails, it was not disputed that the respondent had warned the claimant that she must not disclose the material email. Her conduct was accordingly unacceptable. Although in the circumstances this had not resulted in a postponement, the risk was self-evident.

13. The material email was quarantined by the parties and the tribunal.

<u>The Claimant's Recusal Application</u>

14. During the hearing, the respondent brought a matter to the attention of the tribunal. The respondent's solicitors provided a trainee solicitor who, from the second day of the hearing, sat next to the respondent's counsel to take notes. She took no active part in the hearing.

15. This trainee solicitor recognised one of the tribunal members. The tribunal member had been a witness in a different case for which the respondent solicitors had acted for the employer. There was no connection between the two employers and the two cases. The only contact between the member and the trainee solicitor had been the trainee arranging meetings, and emailing notes of the hearing to the witnesses, including the tribunal member. They have never met in person and she had only seen the member over cloud video platform. The tribunal advised the parties that the lay member had not recognised the trainee solicitor of their own motion, as they had never met in person and he had only seen the trainee solicitor over cloud video platform during a hearing in which she took no active part. He agreed with the trainee solicitor's account.

16. The tribunal adjourned to permit the parties to consider their position. The claimant was giving evidence and on oath at the time. With the consent of the parties, the tribunal permitted the claimant to discuss the question of the tribunal member's position with her legal representative who confirmed to the tribunal he would ensure that no matters relating otherwise to the case would be discussed. After the break, the claimant applied for the tribunal to recuse itself due to a conflict-of-interest on the part of the lay member.

17. The tribunal reminded itself of the case law in *Porter v Magill.* It refused the claimant's application for recusal for the following reasons. The tribunal did not think that an informed and fair-minded observer would conclude there was a real possibility of bias. There had been minimal contact between the lay member and the trainee solicitor before this hearing. There was no contact about any substantive matters. The trainee solicitor had carried out an administrative function, that is arranging meetings and providing notes of evidence. The instructing solicitors were a large and well-known firm who are responsible for a considerable number of cases in the employment tribunal. In view of the tribunal there were no grounds on which a fair-minded and well-informed observer was conclude that was a real possibility bias.

The Issues

18. The Tribunal had sight of a list of agreed issues, appended to this document.

19. There was one amendment at the hearing. In respect of issue 2.3.2 the Tribunal could not find any letter dated 22 February 2020, and it was agreed that this be amended to the letter of 17 February 2020.

The Facts

<u>The Background</u>

20. The respondent is an NHS South London Trust. It operates at two sites, Queen Elizabeth Hospital and University Hospital Lewisham. It has about 7000 staff.

21. The claimant started work on 2 January 2018 as a Consultant Paediatrician and Neonatologist at University Hospital Lewisham.

22. The Tribunal had sight of an internal document from January 2018, relating predominantly to the period before the claimant started work, showing poor feedback from Junior Doctors in the Neonatal Department, by comparison with Paediatrics. Their experience of the clinic was poor, and it was not a learning experience. At times the Junior Doctors, were doing an unfair amount of the work.

23. Before the tribunal, and therefore with hindsight, the respondent accepted that there were serious issues with the department and how it functioned. There were difficulties with consultants working together, and some working relationships were

dysfunctional. The tribunal accepted the respondent's view, because the only way to ensure that regular department meetings between consultants functioned, was to record them. The Consultants were prepared to have their meetings recorded because it was the only way, in their view, that anything got done and participants took responsibility for what had been agreed. Dr Harding told the Tribunal that he had never come across this practice before.

24. The respondent's case was that there had been concerns for some time about the claimant, in effect, not being a team player. The claimant denied this.

25. According to the Divisional Director, there was a particularly poor working relationship between the claimant and a consultant colleague, Dr E. Both had made incident reports in respect of the other's clinical practice. The respondent operates a risk policy with an internal safeguarding reporting system, and staff are told that they should report any incident which might give rise to a potential risk. Any member of staff can complete an electronic report. The tribunal saw that each safeguarding report had a list of at least twenty recipients.

26. The claimant's case was that Dr E had poor, if not dangerous, practice - particularly in respect of the over-feeding of new-borns. Further, Dr O, the Department Manager, favoured Dr E over the claimant in the rota, clinical matters and in their general working relationship.

27. The claimant logged a safeguarding report stating that there had been a failure by Dr E on or around 13 July 2019. When the claimant took over responsibility from Dr E, Dr E had failed to give a handover. This had had the effect of leaving a chickenpox alert on the Neonatal Ward.

28. The Divisional Director investigated this report. She reconfirmed lines of communication to prevent any repeat. She stated that the safeguarding procedure was not the correct place to raise what was in effect a dispute between colleagues.

<u>The Incident on 30 July 2019</u>

29. A complex birth, involving twins, was expected in the department on 30 July 2019. There was an altercation between Dr E and the claimant. The Tribunal had sight of two videos taken by Dr E on her mobile phone. The video showed Dr E approaching the claimant whilst filming. The claimant then started to either video or photograph Dr E. Dr E made repeated requests for the claimant to assist in the clinical matter. The claimant did not agree and on a number of occasions accused Dr E of lying. Neither raised their voice. Both appeared calm but there was no doubt that this was a confrontation. The claimant walked out of the room and along the corridor and Dr followed. The video then stopped as the claimant went into the main ward.

30. The second briefer video showed the claimant coming out of the main ward and back past Dr E in the corridor. She touched Dr E's phone with her pencil case and the video

ended. Dr E later alleged that the claimant had, in fact, knocked the phone from her hand. The video did not show this.

31. Later that day, Dr E posted on the consultant group WhatsApp. She described the claimant as a liar and said that she should, in effect, go to Specsavers.

32. In the event the complex twin birth passed without incident and the respondent later confirmed that both doctors had behaved professionally.

33. That day the claimant met with the Divisional Director and Dr O, the Department for her. She stated that Dr E had been aggressive and angry. The Divisional Director sent an email to the Department saying that she was disappointed that the senior team members had been conducting disagreements on social media.

34. The Divisional Director told the claimant that she had asked Dr O to speak to Dr E. The Divisional Director then asked Dr O to speak to Dr E about the videoing and to find out what had happened.

<u>The protected disclosures</u>

35. The first two protected disclosures were two emails on 2 August 2019 from the claimant to Dr Joanna Lawrence, the Divisional Director, in effect, complaining about Dr E. The first was found at pages 615 as follows ["Mogjan" is Dr E] : –

> Dear Joanna
> Sorry to bother you again.
> I have not heard anything with regard to how will you deal Dr E on going hostility, and what interventions will be taken to prevent this to happen again. Dr E violated all professional boundaries at workplace, and this is a progressing issue, I can assure .you next time when she is angry will physically attack.
> On 13th August, I had no Handover at all after she finishes her week, which had negative implications on patients care, and this never dealt with, I put an incident form and it was advised to close it without any investigations.
> On 30th August she swore, shouted in front of juniors, was aggressive and invaded personal space boundaries when she saw me at NICU to when I went to help with twins and for teaching, she pointed her fingers into my face, uttering threats and insults, she videoed me without any permission, when I tried to escape her and leave the room, she followed me with her phone recording to the corridor shouting and blocking me way, luckily I managed to escape this time, I was about to call security when she quite agitated and blocked my way.
> She accused me as usual of not picking up her, and said that she will call the police to check my phone. I sent a message that I spoken to the obstetric consultant who given all history of the twins antenatal scan, etc., and confirmed that there is a delay in the CS. however she cancelled the teaching more than 3 hours before the section, and sent this text on all consultant WhatsApp group.
> "Mojgan at 15:30, 30th August

You are such a liar- you looked into my eyes in theatre and yet saying that I was not there. You need to go to spectsaver seriously".

She justifying her unusual behaviours explaining she was tired of one day she worked without a SPR, however, I did the whole week, without a handover, or single SPR. Plus I took another roles on top of mine, with an extremely painful hand, I never shouted at anyone.
Such behaviour was not permitted in any other trusts I worked in, but I am not sure is it acceptable in UHL? I can't see anything done about it, never heard the this video deleted. She can't control her anger and I can assure you she will physical attack next time.

I am not happy that will be left to Dr Obi as she always on her side, regardless, however, both try making up mistakes.
It is a long list but I will mentioned few Examples;
- Mojgan was allowed to cancel clinic just few hours before clinic, to do external locum and I was not allowed to move clinic 10 weeks ahead for my hospital appointment
2- Mojgan allowed to do rota in my absence, put my on calls during my days off, and while I was on SL outside the country.
3- My guideline I spent 4 months writing was dismissed by declined by Dr Obi as Mojgan was not ready with her contribution, without caring about patients, and the audit we did confirmed that our NEC rates is higher than average national rates, and we had few deaths following babies inappropriately fully fed within 2 days by Mojgan.
4- I was asked to do on calls on my first week, while I was new to the trust and to the city, and this was a challenge to convince Dr O why I shouldn't, however, she allowed this for others.
5- I was dragged from my hot week, not finishing my ward round to hold an urgent meeting with Mojgan and Ozy, questioning me like a police officer, in how dared I diagnosed Beckwith Wiedemann syndrome, as Ozy missed this diagnosis.
6- On going insults and unprofessionalism on consultant meeting, which commented at buy other locum as it is become a pattern, please ask Dr K as she witnessed a lot of it.
6- Everyone is taking whatever AL as they wanted, always rota and on call sorted at the same time of consultant meeting at a very short notice, however that was an issue when I take my AL.
Please let me know how this will be dealt with?
I look forward to hearing from you soon.

36. The "audit" was an audit conducted under the claimant's supervision, of rates in the department of necrotising enterocolitis (NEC), a serious illness affecting new-borns and a common surgical emergency affecting new-born babies.

37. The second protected disclosure was found at page 619 as follows the
Dear Joanna
Many thanks for reply

We usually handover in advance, and send handover sheet to the overtaking consultant, I have done that when I finished my week, as I felt it is my responsibility to do so.
This never happen when Mojgan finished her week.
Please find attached the email I sent to Dr E, and copied everyone, I never got a reply!
I have tried several attempted to call her, she never replied, never had a missed call or voicemails from her as she claimed , even if I am not accessible by phone, she should have replied my email!
This is the only response from Dr E I got by text on WhatsApp after numerous attempts.
Dr E at 07:52, on 16th July
"Hi Therese, in regards to chicken pox as parents had chicken pox means babies are immune"
By the way when these babies tested they were not immune as Dr E assumed!
It sounds that it was acceptable for Dr O , as this never been discussed in the following consultant meeting. I am sure the same will be for Tuesday incident.
I am not sure what is the next incident will be!
Many thanks
Therese-Mary William

38. The third protected disclosure was also on 2 August 2019 where she entered the incident with Dr E on the respondent's safeguarding system at p518 as follows:

Details Of Incident
Managers are asked to document evidence of a Being Open discussion in the relevant section of the form as part of the response. This is applicable to incidents resulting in Moderate Harm, Severe Harm and Death.
Reported By: TM William
Incident Number: 147544
Date: 3010712019
Time: 13:00
Details: Staff member was aggressive, agitated and could not control her anger, in the workplace. She started a violated conversation, looked intimidating, invaded the personal space boundaries and uttered with threats, and videoed a colleague on personal device without any permission.
Outline Immediate Treatment Given or Action Taken
Details of this incident have been highlighted to the line managers immediately. Advice has been sought from the trust and advised to report this incident and to discuss with line managers according to the trust policy, and for this video to be deleted.
Type: Non-Clinical
Cause Group: Violence & Abuse
Site: University Hospital Lewisham
Department: NICU UHL
Directorate: NICU
Actual Impact: Severe (Permanent or Long Term Harm)

The Aftermath of the Incident

39. On 5 August 2019, the claimant's safeguarding report was closed. The respondent provided no explanation as to why this was. Dr Harding speculated that it was such an incendiary matter that it was closed down, but no respondent witness was able to explain why the claimant's concerns had not been investigated until raised later as a grievance.

40. The Divisional Director met with Dr O and, according to an email, suggested that the matter might need to be considered as a disciplinary against the claimant. Dr O met with Dr E and viewed the videos, which were provided about seven to nine days after the incident.

41. In the email (page 636) Dr O stated, "Unfortunately it seems that the incident which occurred on the unit was more serious than first thought as [Dr E] tells me that [the claimant] actually physically hit her… I have seen a video clip which verifies this information as being factual. Although from the clip I can see that [the claimant] definitely struck [Dr E] I cannot tell how hard it was."

42. Dr O recounted her conversation with Dr E and the two nurses on duty; she had yet to speak to any of the junior doctors on duty. According to the email, Dr E had stated that she had been trying to contact the claimant to plan for the complex delivery but the claimant ignored her. Dr E had said that she had filmed the claimant without permission in order to provide an accurate account and to try to persuade the claimant to attend the delivery. Dr O told Dr E that it was not appropriate to film a colleague without permission. According to the email Dr E had alleged that the claimant "struck [Dr E's] towards her face and hit her with a pencil case that she was holding in her hand. As mentioned above, I [Dr O] have seen this on a video clip and the strike made contact with [Dr E]". According to the email, neither of the nurses on duty had seen any confrontation, aggression or rude behaviour.

43. The email went on to describe "objective information seen and heard from the video clip". The account in the email of the video is broadly accurate, save for the following "The second video clip surely clearly show [Dr E] being struck towards her face by (the claimant] with a pencil case and [the claimant's] strike making contact with [Dr E]". According to Dr O, the version of events in the videos did not fit with the claimant's account. Dr O felt that this was a patient safety issue – a team member was refusing to listen to important clinical information and planning for a complex delivery. She stated that there had been an "act of physical aggression by the claimant" which was "extremely worrying as well as very sad". She stated "I do feel this has now gotten to the stage where this needs to be investigated fully by independent members of staff…"

44. However, at least some of Dr O's account was inaccurate. The video showed that the claimant did not strike Dr E. The claimant touched or tapped Dr E's phone with her pencil case.

The MHPS Investigation and Suspension

45. On 7 August 2019 HR spoke to Dr Harding about the incident. It was described as a serious incident between the claimant and Dr E. Dr Harding had sight of Dr O's email of 6 August 2019. He watched the two videos without any sound. He initially told the Tribunal that he had not seen the two first two protected disclosures (the claimant's emails of 2 August). However, when taken to the documents, he agreed that he had seen the emails, but had forgotten. Dr Harding told the Tribunal that at this time he was unaware of what he now viewed as a dysfunctional unit with significant working problems and clinical difficulties between consultants.

46. Accordingly, when making his decisions, Dr Harding had seen all three putative protected disclosures (the safeguarding report and the claimant's two emails), the email from Dr O, and had seen the video although not heard what was said.

47. Dr Harding told the Tribunal that Dr E filming was inherently potentially intimidating, and it was certainly very much frowned on. He agreed, having heard the sound on the video at the Tribunal, that it might be said that Dr E was to some extent hounding the claimant, and he agreed that the account of the video in Dr O's email was not accurate.

48. Dr Harding, working in concert with HR and Practitioner Performance Advice ('PPA') decided to start an MHPS investigation. He was the Case Manager for the MHPS. He excluded, that is suspended, the claimant from the site for two weeks. He passed on the comments from Dr O to the PPA which on 9 August, confirmed that, based on the information provided, the incident should be investigated under MHPS.

49. The claimant alleged that Dr Harding had reported her to the PPA in respect of substance abuse. The Tribunal did not accept that this had happened. The tribunal understood the allegation to be based on the PPA, when completing the form in respect of the claimant, having ticked the box in a drop-down menu marked 'health including substance abuse.' In the view of the tribunal this was an option in a drop-down menu and it indicated that there was a possible health problem which might or might not include substance abuse. There was no evidence that Dr Harding had mentioned substance abuse to the PPA. Accordingly, Dr Harding was not responsible for the PPA document.

50. On 14 August Dr Harding told the claimant that she was being investigated under the respondent's MHPS for the following:-

    i. Whether on 30 July she knowingly refused to engage with Dr E in a clinical conversation in respect of the impending twin delivery;

    ii. Whether she struck Dr E physically;

    iii. Whether she deliberately provided incorrect information;

iv. Whether she did not engage appropriately with Dr E in the subsequent caesarean section; and

v. Whether the claimant's behaviour had resulted in dysfunction with the Neonatal team.

51. Dr Harding gave various reasons for his decision to suspend the claimant. He said that it was because of violence. He said that the allegation that the claimant refused to attend the clinical issue was also relevant. Dr Harding also said he suspended the claimant because he feared that she might alter evidence, although there was no detail as to why he thought this. He also stated that he believed that the decision to suspend was required by the respondent's suspension policy. The policy stated suspension was required if there was a critical incident.

52. On 30 September Dr Harding lifted the claimant's suspension with her first clinic scheduled for 11 October 2019. He confirmed this in writing.

53. Dr McCall, a consultant in geriatrics and general medicine with the Trust, was tasked with the MHPS investigation. She interviewed the claimant on 3 September when for the first time, the claimant alleged that Dr E had assaulted her. Essentially, the claimant alleged that Dr E's phone had come into contact with the claimant's face when Dr E was videoing. The claimant gave varying accounts as to whether this was deliberate or not.

54. Dr McCall also took evidence from Dr E, Dr O, another Consultant, and from the Divisional Director. In addition, the claimant gave a written statement.

55. Shortly after the suspension was lifted, the claimant attended the site and met with Mr Byron Charlton, the respondent's Head of Information Governance and Assurance on 2 October.

56. As a result of the meeting, a further incident report , dated 2 October, was generated on the safeguarding system in respect of the incident of the 30 July. The 2 October incident report was similar to the earlier report, save that it included a new allegation that Dr E had physically assaulted the claimant. The system showed that the claimant had generated this new report.

57. Dr Harding reasonably assumed that the claimant had filed the report on 2 October. He thereupon decided that having her back on site white prejudice the investigation and he excluded her again on 8 October. He told the tribunal that he had spoken to Dr O and Dr E on the telephone. He said that they were both extremely upset at the idea of the claimant returning to work. They were fearful and Dr E was shouting.

58. On 7 October 2019, the claimant submitted a grievance. The respondent initially dealt with this as a grievance, but then realised that a number of matters overlapped with the MHPS investigation. On 4 November, the respondent told the claimant that all the matters in the grievance that overlapped with the investigation would be dealt

with under the MHPS process. The matters that did not overlap would be dealt with under the grievance procedure.

59. Dr Harding widened the MHPS to investigate if the claimant had entered the respondent's premises to file the second safeguarding report and had then lied about it. As a result, Dr McCall interviewed Mr Charlton. On 25 November 2019 Dr McCall informed Dr Harding that there had been a mistake, and, in fact, it was not the claimant who had entered the second safeguarding incident as it appeared, but Mr Charlton.

60. Despite this, Dr Harding did not lift the claimant's exclusion. He told the tribunal that he had wanted to view the report, which he believed was imminent, before making a decision about the exclusion. The claimant accordingly remained excluded.

61. The claimant and Dr Harding spoke on the telephone on 2 January 2020. This was a lengthy call which both found difficult. The claimant contended that Dr Harding told her that she was going to be dismissed. Dr Harding, in contrast, stated that he had warned her that a potential outcome of the MHPS was dismissal. Dr Harding told the claimant that he felt that she was manipulating evidence.

62. Dr Harding then lifted the claimant's exclusion on 7 January 2020.

63. The MHPS investigation reported on 25 January 2020. Dr McCall found that the claimant had provided an incorrect account of the events of 30 July but did not intend to mislead as, in effect, she was upset at the time. None of the other allegations against the claimant were made out (page 1004). The investigation found that there was a pre-existing dysfunction in the team which was leading to poor communications. Dr McCall, in her report, made criticisms of both the claimant and Dr E, and to lesser extent Dr O.

<u>The Disciplinary Procedure</u>

64. Dr Harding wrote to the claimant on 12 February informing her of this outcome. He stated that there was, in his view, a case to answer on the third charge -that she had misled as to the incidents on 30 July and provided incorrect information. Accordingly, this would proceed to a disciplinary.

65. Dr Harding told the Tribunal he could not explain his thinking as to why he made this decision. In his witness statement he said that he took the view that it should go to disciplinary as it was a serious matter, and this would communicate clearly to the claimant the severity of the matter. Dr Harding also felt that he was too involved at this point and was not independent, and he wanted to pass it to an independent person.

66. On 24 February, the claimant updated her grievance to include allegations of bullying and harassment. The respondent investigated the grievance under the Dignity at Work Policy and appointed Ms Lewis-Towler (Divisional Director of Operations and

Performance at the Queen Elizabeth Hospital) to investigate. She took responsibility essentially for those aspects of the grievance which did not overlap with the disciplinary investigation. These allegations were mainly to do with Dr E's clinical practice and that Dr O unfairly favoured Dr E over the claimant.

67. Ms Helen Peskett, Divisional Director of Operations, Surgery and Cancer, was tasked with the disciplinary. She had only recently started in the respondent's employment. She wrote to the claimant on 17 April 2020 inviting her to the disciplinary hearing. She informed the claimant that she could chose to be accompanied and explained the hearing process.

68. The letter stated that the hearing would consider the investigation findings

> "Whether you provided deliberately incorrect information in: (a) emails to Dr Joanna Lawrence of 30.07.19 and 02.08.19 and (b) your completed incident form (reference 147544) in relation to this incident, in particular by stating that Dr [E] swore, shouted, was aggressive, invaded your personal space, threatened you, insulated you and blocked your exit.
>
> I must advise you that if upheld, these allegations may constitute gross misconduct, and depending on the facts established at the hearing, could result in disciplinary action being taken against you."

69. The disciplinary hearing duly went ahead on 22 April 2020. The claimant was represented by a barrister, Mr Walsh. Ms Peskett did not view or listen to the videos because the claimant had strongly objected to this. Ms Peskett relied on Dr McCall's report. The claimant did not call any witnesses. Ms Peskett heard from Dr E and from the claimant at hearing.

70. In an outcome letter of 5 May 2020, Ms Peskett issued the claimant with a written warning for twelve months on the basis that she had provided incorrect information in respect of the incident of 30 July.

71. The claimant appealed against the warning on 16 May 2020. The claimant was informed that she was allowed to submit new information to the appeal.

72. The appeal was heard by Ms Rachael Backler, Director of Performance, on 24 June 2020. Ms Backler upheld the decision.

<u>The Grievance Procedure</u>

73. Ms Lewis-Towler conducted a lengthy and, in the view of the Tribunal, thorough investigation of the claimant's grievance including speaking to a further two consultants.

74. On 9 September 2020 Professor Andrews, the interim divisional medical director met with the claimant to inform her of the result of the grievance. He told her that some

of her grievance had been upheld including her allegation that Dr E had called her a liar. He wrote to the claimant to confirm the grievance outcome on 15 September.

75. Dr E had not cooperated with the grievance and had left the respondent employment by this time. The respondent said that, therefore, it did not take any further steps in respect of her.

76. The claimant appealed the grievance decision. Ms Kate Anderson, Director of Corporate Affairs heard the grievance appeal on 26 October 2020. Ms Anderson rejected the appeal and upheld the decision on the grievance.

The Law

77. The law in respect of protected disclosure (Public Interest Disclosure Act or PIDA) is found in the Employment Rights Act 1996 at section 43B.

78. A qualifying disclosure is a disclosure of information which in the reasonable belief of the person making the disclosure was made in the public interest and tends to show one or more of specified failures. The only two failures on which the claimant relied were, in the alternative:-

> That a person has failed, is failed or is likely to fail to comply with any legal obligation to which they are subject; or
> That the health and safety of any individual has been, is being or is likely to be endangered.

79. Under section 47B(1), a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure.

80. A worker under section 47B(1A and1B) has the right not to be subjected to any detriment done by another worker of their employer or by any agent of their employer, with the employer's authority on the ground that the worker had made a protected disclosure and where a worker is subjected to detriment by anything done by a colleague, that is also treated as being done by the worker's employer.

81. A tribunal complaint in respect of PIDA detriment must be brought, once account is taken of the ACAS early conciliation requirements, within three months less one day of the act complained of.

82. Acts outside of this time may be considered if they form part of a series of acts with acts which occurred within the time limit. Otherwise, a Tribunal may only consider out of time acts if it was not reasonably practicable to bring the complaint within time and the complaint was brought within such further time as was reasonable.

Submissions

83. The respondent provided written submissions and made oral submissions, and the claimant made oral submissions.

Applying the Law to the Facts

Was There a Protected Disclosure?

84. Under statute, a qualifying protected disclosure is made up of a number of elements. Section 43B Employment Rights Act firstly requires a disclosure of information and fact. According to the Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850:-

> "In order for a statement or disclosure to be a qualifying disclosure … it has to have a sufficient factual content and specificity such as is capable tending to show one of the matters listed…"

There must be a "minimum factual content."

85. Secondly, the worker must reasonably believe that the disclosure was made in the public interest and tends to show one of the relevant failures under section 43B.

86. It is well established that if a worker incorrectly believes that a relevant failure under section 43B has occurred, this does not necessarily prevent there being a protected disclosure. To put it another way, there can be a protected disclosure even if the worker is wrong. The tribunal must be careful to assess the reasonableness of the worker's belief on the facts known to them at the time, not the facts later established by the tribunal. The Tribunal reminded itself of the distinction set out by the Employment Appeal Tribunal in *Soh v Imperial College of Science, Technology and Medicine EAT 0350/14* (a case where the worker had no personal knowledge relating to the relevant failure) between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'.

87. The tribunal also directed itself in line with the case of *Darnton v Surrey* [2003] IRLR 133 at paragraph 29

> "In our opinion, the determination of the factual accuracy of the disclosure by the tribunal will, in many cases, be an important tool in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure…. The relevance and extent of the employment tribunal's enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by s.43B(1). … We consider that as a matter of both law and common sense all circumstances must be considered together in determining whether the worker holds the reasonable belief. The circumstances will include his

belief in the factual basis of the information disclosed as well as what those facts tend to show. The more the worker claims to have direct knowledge of the matters which are the subject of the disclosure, the more relevant will be his belief in the truth of what he says in determining whether he holds that reasonable belief.

88. The question of whether a worker has a reasonable belief under section 43B(1) is a mixed objective and subjective test. The worker must themselves genuinely believe that the information disclosed tends to show one of the relevant failures. In addition, that belief must be objectively reasonable for someone in the worker's situation and with their personal characteristics, including their skills and knowledge. It is not a question of whether a hypothetical reasonable person would have had that belief, but whether a reasonable individual with the personal characteristics of the worker would have had that belief.

89. According to the Employment Appeal Tribunal in *Korashi v Abertawe Bro Morgannwg University Local Health Board*, the threshold for the reasonable belief is a low one.

90. The Tribunal divided the protected disclosures into three topics, rather than considering each disclosure separately, because the contents of the three disclosures overlapped significantly. There were three matters:-

i. The handover between Dr E and the claimant on 13 July;

ii. The incident of the 30 July; and

iii. Allegations in respect of Dr E and Dr O concerning clinical performance and favouritism.

91. The Tribunal firstly considered the complaint about the failure of Dr E to handover to the claimant on 13 July. This was covered in the first substantive paragraph of the first protected disclosure (PD1) and the entirety of the second protected disclosure (PD2). The Tribunal considered whether, in these emails, the claimant had disclosed information which in her reasonable belief was in the public interest and tended to show that Health and Safety had been endangered or a legal obligation breached (i.e., that there had been a proscribed failure).

92. PD1 was a lengthy email covering a number of issues and it had to be considered in the context of the claimant complaining about Dr E to the Director. In the disclosures, the claimant stated, 'I had no handover of [13 July] (it was agreed that the date in PD1 was wrongly stated as 13 August) and this had negative implications for patient care'.

93. PD2 expanded this complaint to include a specific issue, the chickenpox case on the neonatal ward. The claimant stated that handover is usually done in advance. She

does so, 'as she felt it was [her] responsibility to do so.' In the view of the tribunal, the claimant was referring, here, to good clinical practice.

94. The claimant's complaint in effect was that Dr E failed to complete a handover sheet or to discuss matters with the claimant. There was no suggestion that the claimant had no information about what was happening on the ward, there simply was no proper handover.

95. The Divisional Medical Director told the grievance investigation that consultants carrying out a handover is important and lack of such is unacceptable and poor practice.

96. The Tribunal accepted that the claimant had disclosed sufficient information in that there was a minimum factual content to the disclosure. The claimant stated that there was a failure to carry out a handover and she provided specific details containing the chickenpox case.

97. The tribunal went on to consider whether the claimant reasonably subjectively and objectively believed that this information tended to show that there had been a breach of a legal obligation. The protected disclosures showed that the claimant was talking of good practice and this interpretation was corroborated by the view of the Divisional Medical Director. The tribunal accepted that the claimant's belief was objectively and subjectively reasonable. The claimant was disclosing information that in her reasonable belief Dr E was responsible for poor practice.

98. However, there was no indication that she believed that there was a failure to comply with a legal obligation. It is trite law that a claimant does not need to be specific about the legal obligation on which they rely, however they must reasonably believe that the information tends to show that there was a failure to comply. The claimant sent two lengthy emails which referred to this matter but did not indicate that she believed there was a failure to comply with any legal obligation. The evidence shows that the claimant was prepared to make serious allegations against Dr E and, in the view of the tribunal, if she had genuinely believed that Dr E was failing to comply with a legal obligation, she would have said so.

99. The Tribunal went on to consider whether she had reasonably believed that the information disclosed tended to show that the health and safety of any individual has been, was being or was likely to be endangered.

100. The claimant in terms said that she thought patient safety had been compromised. The Tribunal noted that the incident had been marked by the respondent as very low risk. In the view of the tribunal the reasonableness and genuineness of the claimant's belief was coloured by her very poor personal working relationship with Dr E. Nevertheless, the Tribunal was reluctant to find that the claimant did not objectively reasonably believe that a potential chickenpox case on a Neonatal ICU endangered any individual's Health and Safety. The tribunal took into account the claimant's personal circumstances, that is a consultant working in her specialist field with a high

level of skill and knowledge of clinical matters. The tribunal bore in mind the guidance of the Employment Appeal Tribunal in *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, that a tribunal should have due respect for specialist knowledge when assessing the reasonableness of belief in such circumstances.

101. Accordingly, the tribunal found that the claimant had made a qualifying protected disclosure in respect of the handover from Dr E to her on 13 July.

102. The Tribunal next considered the incident of 30 July. The tribunal accepted that the claimant had disclosed sufficient information as her complaints were detailed and referred to specific actions on a specific date by a specific person.

103. As to the reasonableness of the claimant's belief that the information tended to show a proscribed failure, the Tribunal accepted the respondent's submission that *Darnton v Surrey* was of assistance. The tribunal accepted that it had to enquire into factual accuracy. This was particularly the case because the claimant claimed to have direct knowledge of the matters which were the subject of the disclosures. That made the question of the claimant's belief in the truth of what she said more relevant to the determination of whether she held the necessary reasonable belief.

104. The tribunal could not make a simple finding that all elements of the claimant's account were true or were untrue. It was a mixture. Some parts of the account were not true and the claimant knew they were not true. The claimant herself accepted that she had not been sworn at. Whilst she had been called a liar (which she felt was culturally equivalent), Dr E had not sworn at her.

105. There were some parts of her account which were unquestionably true. She had been videoed without her permission and this was evident from the videos. It was also true that she had publicly been accused of being a liar (in the WhatsApp message to the Department). The comment about going to Specsavers had been made.

106. The Tribunal did not accept that the claimant's reference to a 'violated conversation' was a protected disclosure. It was simply unclear what this meant.

107. According to the respondent submissions, the claimant could not have reasonably believed in her account of 30 July because it was, 'grossly exaggerated.'

108. The Tribunal therefore embarked on an enquiry into the factual accuracy of the disclosure. The Tribunal had the advantage of sight of the two videos which in total lasted about two minutes. The videos did not show any of the disputed conduct. The nearest was that Dr E was somewhat close to the claimant and had followed her into the corridor. The videos did not show that Dr E had shouted at the claimant in front of juniors. The videos did not show Dr E pointing fingers or being aggressive, invading the claimant's personal space or uttering threats of insults. The videos did not show Dr E blocking her way. The videos did not show Dr E agitated. The videos did not

show Dr E threatening to call the police. There was no evidence in the video that Dr E failed to control her anger.

109. In addition to the videos, the claimant relied on what she said was a screenshot taken from a video that she had taken at the time. The claimant's account of how this image came to be was inconsistent. She originally described the image as a screenshot from a video but later described it as a photo. Apart from this the claimant had not provided any further information or evidence about how the image was created. The images were blurred and unclear. Having considered the images, the tribunal concluded that no reliable conclusions could be drawn from the images and they were of no assistance.

110. In its submissions, the respondent contended that the claimant's credibility in respect of the incident was, in general, very poor and that this indicated that she did not have a genuine and reasonable belief the allegations in the protected disclosures. It relied particularly on the claimant's allegation that she had been assaulted and the respondent's submissions dealt with this at length, over several pages.

111. In view of the tribunal the relevant question was not whether the events alleged by the claimant genuinely occurred but whether the claimant reasonably believed that her account of these events tended to show a proscribed failure. If the claimant reasonably believed that Dr E had done something that Dr E had not actually done, this would not prevent the claimant from having made a protected disclosure

112. The tribunal considered the credibility of the claimant's account of the incident. She gave an account in her statement and at her meeting with Dr McCall, the investigating officer for MHPS. The tribunal found it difficult to fit this account with the video evidence. For instance, at the investigation meeting on 24 September 2019 with Dr McCall (page 689), the minutes record the claimant saying, "she was standing facing me to get my images and video recording me and blocks my exit, I could not go anywhere and kept standing still, that was the reason she managed to video recording me that nearly 5 minutes, … I started to make a move towards the door,… She didn't realise how close she was to me, [Dr E's] phone hit my face in some point, I don't know she meant to hit me but can't say that for sure, this happened during the course of this incident… I push the phone out of my way and said excuse me… I squeezed to go out the room (sic)."

113. This account was clearly inconsistent with the video.

114. The tribunal understood the claimant's case to be that the videos were in effect misleading because they had either been edited after the event or that they did not constitute a full record of the incident.

115. At the hearing, the Tribunal took the claimant through the chronology asking for her account of what had happened before the first video, between the two videos and after the second video, in order to obtain from her an account of the entire incident. At no point did the claimant suggest that she had left the room twice. Accordingly,

the only occasion on which Dr E could have blocked the claimant from leaving the room was during the videos. However, it was clear from the videos that Dr E had not blocked the claimant from leaving the room.

116. The Tribunal found that Dr E did not block the claimant because the only occasion when this could have happened was when the claimant left the room, and this was recorded on the video which showed that this had not happened.

117. Further, the videos did not show that Dr E's phone had made contact with the claimant's face when she left the room. As the claimant did not suggest or indicate she had left the room twice, there was no occasion on which Dr E's phone might have made contact with the claimant's face. The claimant's account before the tribunal was also inconsistent with evidence that she earlier gave to the Tribunal when she said that she was hit with the phone before the video started.

118. The Tribunal also found, on the balance of probabilities, that the phone, whether deliberately or not, had not come into contact with the claimant's face before the start of the first video. The claimant, although clearly annoyed, appeared calm and collected during the first video. This was entirely inconsistent with Dr E's phone having made contact with her face just before the video. The video showed that the claimant repeatedly stating that Dr E was rude, but she never mentioned that Dr had just made contact with her phone.

119. There were further concerns about the accuracy of the claimant's account of the part of the incident which, on her case, was not captured by the videos. She at various times said that it had taken ten minutes and another time that it had taken thirty minutes.

120. In contrast Dr E's account of why there were two separate videos was persuasive. Dr E's account was that she had stopped videoing when the claimant went into the main ward . The tribunal accepted this is most likely explanation because Dr E did not wish to film on the ward, either because she did not wish to film others, or she did not wish to be seen filming the claimant. Dr E's account was consistent with the video stopping when the claimant went into the main ward and then starting again when she came back to where Dr E was waiting in the corridor.

121. These inconsistencies in the claimant's account made it more difficult for the Tribunal to rely on the claimant's account of what had happened on 30 July.

122. Accordingly, the Tribunal found that the claimant did not reasonably believe that the Dr E had blocked her from leaving the room or had hit her, whether deliberately or not, with the mobile phone

123. A further difficulty with the credibility of the claimant's account was her telling the tribunal that a nurse could be seen standing next to her during the second video. It was clear to the Tribunal that there was no nurse in the second video. There was simply a section of the wall that was painted blue. In the view of the Tribunal, if there

had been a nurse witness, the claimant would have said so at the time and either given a name, or a description. Whilst this allegation did not form part of any protected disclosure, it cast further doubt on the accuracy of the claimant's account and therefore the objective reasonableness of her belief that this account tended to show a proscribed failure.

124. The tribunal also found on the balance of probabilities, that Dr E had not shouted. There was no shouting on the video. Accordingly, the claimant's case had to be that that Dr E had shouted but this was not recorded. In the view of the Tribunal, Dr E was videoing the claimant as a calculated act designed to show the claimant in poor light. She was careful only to refer to clinical matters. She repeated the same question to the claimant. From her tone of voice, what she said, and what can be inferred of her physical positioning from the video, she appeared very much in control during the incident. It would be entirely inconsistent with this behaviour for her to shout, let alone shout in front of Junior Doctors. The claimant was present throughout the incident and knew what had happened. Accordingly, the claimant did not objectively reasonably believe that this had occurred and that the account of it tended to show a proscribed failure.

125. There was no evidence on the video that Dr E had pointed a finger. The tribunal thought it unlikely that Dr E had pointed because she was occupied with videoing the claimant .

126. The claimant stated that Dr E was aggressive. The tribunal accepted that the claimant could reasonably have believed that Dr E was verbally but not physically aggressive. The behaviour of Dr E was unprofessional and provocative. The claimant, from the evidence in the video, could reasonably have found that to some extent her personal space was invaded. However, it was clear from the video that Dr E did not come close to the claimant. The claimant's body language did not suggest that she was intimidated.

127. Accordingly, the reasonableness and reliability of the claimant's account was variable. Some parts of it were true, some parts were untrue, and the tribunal had found on the balance of probabilities that many parts were unlikely to have happened. To sum up, the tribunal found that the claimant considerably exaggerated her account of the 30 July incident. The Tribunal was bolstered in its view of the claimant's further exaggerating the incident by her adding an allegation of assault later in the process.

128. The tribunal found that the claimant had a reasonable belief in certain allegations made in the protected disclosure concerning the incident on 30 July. Dr E had accused her of lying. She had sent a notably unprofessional WhatsApp message. She had followed the claimant and videoed her without permission. To a certain extent it would be reasonable for the claimant to have found this behaviour intimidating and verbally aggressive. It was certainly unprofessional.

129. The Tribunal went on to consider whether in her account of those elements of the incident in the protected disclosures, the claimant reasonably believed that this tended to show that Health and Safety had been, was being or was likely to be endangered. The Tribunal found that it did not tend to show this for the following reasons.

130. The claimant was in a dysfunctional working relationship with Dr E. They had worked together, although in conflict with each other, for some time. The claimant knew how Dr E behaved and therefore to some extent how she was likely to behave.

131. Whilst the video did not show the full encounter, her body language in the video was at odds with the claimant feeling that her own health and safety had been endangered or had, prior to the first or second video, been endangered. The claimant appeared annoyed if not angry but she did not appear in any way frightened or intimidated. There was nothing in the claimant's account of what happened after the second video which was consistent with any reasonable belief that the claimant's health and safety had been endangered.

132. As the tribunal had found, the claimant had exaggerated the incident as 'a miraculous escape,' and her being so fearful of Dr E that she considered calling security. Whilst the behaviour of Dr E was not appropriate or professional, in the view of the Tribunal, the claimant did not have a reasonable belief that her Health and Safety had been endangered during this incident.

133. The Tribunal went on to consider whether the Health and Safety of others had been endangered. The Tribunal understood the claimant's case to be that Dr E's conduct had demoralised staff including herself and this had impacted on patient care.

134. The tribunal could point to no evidence to support this contention. There was no evidence that a confrontation between two senior staff, who had an ongoing dysfunctional working relationship, had impacted on patient care. The respondent MHPS investigation expressly considered whether there had been an adverse impact on patient care. The investigation found that the claimant and Dr E had worked perfectly properly together on the complex twin delivery and there was no such adverse impact, still less that health and safety had been endangered.

135. The Tribunal went on to consider whether the claimant had a reasonable belief that the information in the protected disclosures in respect of the incident of 30 July tended to show that a legal obligation had been breached.

136. The Tribunal bore in mind that the claimant is not a lawyer. It is, again, trite law that a claimant does not need to the specific about the legal obligation they had in mind. For a claimant to succeed, it must be reasonable for someone in her position with her characteristics to believe that a legal obligation was breached. In her witness statement the claimant relied on what she described as the doctor's common law duty and employer's contractual duty to take reasonable care of their patients and to provide a safe workplace.

137. The Tribunal determined that the claimant did not reasonably believe that the information disclosed tended to show a failure to comply with a legal obligation for, essentially, the same reasons as in respect of health and safety. Dr E had called the claimant a liar, she had to some extent invaded the claimant space, and not behaved professionally in her interactions with the claimant. This was an unpleasant and poorly functioning working relationship. At the time, the claimant did not contend or identify any legal obligation which she said Dr E had breached. In the view of the Tribunal, this indicated that she did not reasonably believe that there had been such a breach. The information disclosed tended to show that unprofessional and dysfunctional behaviour, but that was not the same as the breach of a legal obligation.

138. The Tribunal went on to the third matter covered in the protected disclosures, the numbered allegations against Dr E and Dr O contained in PD1 (page 616).

139. The first allegation was that Dr E cancelled a clinic only a few hours in advance in order to work as an external locum, whereas the claimant was not permitted to move her clinic when she gave ten weeks warning of a hospital appointment. Essentially the claimant was alleging favouritism, in that Dr E was permitted to cancel a clinic for personal gain whereas the claimant was not permitted to cancel a clinic when she had a good reason to do so.

140. The Tribunal did not accept the case made in the claimant's submissions that the claimant was disclosing that Dr E was defrauding the Trust by working for two employers at the same time. In the view of the Tribunal, the clear sense of this email was a complaint that Dr O was giving Dr E preferential treatment by being more flexible about the rota. There was nothing about fraud.

141. In the view of the Tribunal, the claimant did not have a reasonable belief that this information tended to show a proscribed failure. It was a complaint, and the Tribunal was not in a position to know how valid, about favouritism and poor management, and no more. The second allegation was essentially the same in that Dr E was allowed to fix the rota, and rota'd the claimant inappropriately or inconveniently. This was a complaint about favouritism in the Department.

142. The Tribunal viewed the third allegation as the most serious.

> "My guideline, I spent four months writing was, dismissed by declined by Dr O as (Dr E) was not ready with her contribution, without caring about patients, and the audit we did confirmed that our NEC rates is higher than average national rates and we had few deaths following babies inappropriately fully fed within two days by (Dr E)." (sic)

143. The Tribunal broke this allegation down into three parts (i) the guidelines, (ii) the NEC rates and (iii) the deaths.

144. In respect of the guidelines, the Tribunal could not find that the claimant had a reasonable belief that the information disclosed tended to show that health and safety had been endangered. The tribunal understood the claimant's case to be that the health and safety of patients and in particular new-borns was being or was likely to be endangered by the failure to adopt the claimant's guidelines.

145. Again, the tribunal was mindful that it should respect the claimant specialist knowledge in this area when considering the objective reasonableness of the claimant's belief. In determining reasonableness of the claimant's belief, the tribunal took into account the claimant's submissions during her grievance which expressly date dealt with the guidelines issue. The claimant titled this section as "undermining and dismissing my work (enteral feeding guidelines)." She went into some detail in the history of feeding guidelines in 2018. She stated that she had raised that the unit did not have any guidelines in use. Dr O suggested using King's College Hospital guidelines when the claimant was partway through writing her guidelines. Dr O then, following a conversation with Dr E, decided that the unit would adopt the East of England guidelines, thereby in effect dismissing the claimant's work on drafting guidelines. The claimant characterised this incident as bullying by Dr E.

146. The tribunal did not find that the claimant reasonably believed that disclosing information about the guidelines tended to show that health and safety had been, was being or was likely to be endangered. The reasons for this were as follows. Before the claimant had completed her guidelines, the department had identified other guidelines to be adopted. The force of the claimant's complaint about guidelines in the grievance was not that the guidelines from King's College Hospital or the East of England were endangering health and safety, but rather that her contributions were unjustifiably dismissed. The claimant did not state in her grievance that the East of England guidelines were inferior, still less that they could endanger health and safety.

147. Secondly, the Tribunal considered the rates of NEC. Did the claimant reasonably believe that the comments she made about the respondent's rates of NEC tended to show that health and safety had been, was being or was likely to be endangered? Again, the tribunal reminded itself that it must show respect for the claimant's specialist knowledge, in particular in the area in which she had run an audit, the respondent's rates of NEC.

148. The difficulty was that the claimant did not state the outcome of the audit accurately. (This was an audit that the claimant had conducted with Junior Doctors into the respondent's rates of NEC.) This had happened some time prior to the events material to this claim. According to PD1, the respondent's NEC rate was higher than national rates. However, according to the documents and the claimant's evidence before the tribunal, this is not what the audit found. The audit found that the respondent's rate was higher than the rates in higher income countries in general. It did not find that the rate was higher than the average in the UK.

149. The Tribunal did not accept the respondent's submissions that there can never be a reasonable belief if there is no evidential basis for a disclosure. However, if there is not an evidential basis, this makes it far harder for the claimant to establish a reasonable belief, particularly in an area of her specialist expertise. On the facts, the tribunal did not find that the claimant had an objectively reasonable belief that the information disclosed about NEC rates tended to show that health and safety was endangered, because the evidence on which she relied did not show this. She was responsible for the audit and she would have been familiar its results and methodology. This was not a case where she had misunderstood a study conducted by another clinician.

150. The third part of the potential disclosure was the information that there had been 'a few deaths' following Dr E's shortcomings in treatment. The difficulty again was that this was not an accurate statement. In cross-examination, the claimant did not say that there was more than one death. In the view of the tribunal there was a considerable difference between one death and "a few deaths," particularly in a relatively brief time period and within a single department. Again, the claimant could not have misunderstood the numbers because she worked in the department and was intimately involved in outcomes. Further, there was no corroborating evidence that Dr E's feeding regimes were responsible for the single death. Whilst the Tribunal reminded itself that it should have respect for the claimant's expertise, it noted that a clinical reviewer had found nothing wrong with Dr E's practice.

151. In the view of the Tribunal, whilst the claimant had some genuine concerns about NEC rates and the guidelines she had spent time drafting, PD1 was an email sent in the context of a dysfunctional and unhappy working relationship with Dr E, which had just come to a head on 30 July. The claimant was angry and this led to exaggeration. The tribunal could not find that she had an objectively reasonable belief that this information tended to show a proscribed failure as she was aware that the information was not accurate. Accordingly, this did not amount to a protected disclosure.

152. The final matters were the claimant being on call, a discussion about a particular syndrome, on-going insults and unprofessionalism at a consultant meeting and the claimant being unfairly treated in respect of her annual leave. In the view of the Tribunal, there was not sufficient factual content to show a proscribed failure. The claimant was raising a complaint about Dr O's management of her and the department in general.

<u>Causation</u>

153. The tribunal went on to consider what if any influence the protected disclosure had on the decision-makers.

154. In summary the Tribunal had found that the claimant had made a protected disclosure in respect of the lack of handover, found in PD2 and the first substantive paragraph of PD1.

155. According to the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, "detriment" means suffering a disadvantage of some kind. Whether something that amounts to a detriment must be assessed from the point of view of the victim. It is not necessary for there to be physical or economic consequences. An action or failure to act may amount to a detriment.

156. The tribunal went on to consider whether the claimant was subjected to a detriment on the ground that she had made the disclosures. The tribunal directed itself in line with *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*. A tribunal must determine whether the protected disclosure materially (that is more than trivially) influences the decision-maker who subjected the claimant to detriment.

157. The case law recognises that it is relatively rare for an employer to admit that it has subjected a worker to detriment for making a protected disclosure. On many occasions a tribunal will be invited to draw inferences to this effect. The Employment Appeal Tribunal under its President in *International Petroleum Ltd and ors v Osipov and ors EAT 0058/17* set out at paragraph 115 the correct approach to the burden of proof as follows:

(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
(b) By virtue of s.48(2) ERA 1996 , the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see *London Borough of Harrow v. Knight* at paragraph 20.
(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

158. The Tribunal considered the first detriment, Dr Harding excluding the claimant twice, on 14 August and on 8 October 2019.

159. The tribunal considered the respondent's explanation for why the claimant was suspended twice.

160. The respondent's explanation for the first exclusion was inconsistent and confused. Dr Harding gave various reasons for his decision to suspend the claimant. He said that it was because of violence. However, Dr Harding viewed the videos which showed that there was no physical contact, i.e., the claimant did not strike or make contact with Dr E. She hit or touched Dr E's phone with her pencil case. Accordingly, it should have been clear to Dr Harding that Dr O's account was not accurate in one, at least one respect. Nevertheless, he told the Tribunal that, in effect, he was heavily reliant on Dr O's account. Where there was a conflict between staff, he said that he had a practice of going with what the manager said, and that was Dr O.

161. The Tribunal also could not understand how the decision to suspend was required by the respondent's suspension policy. The policy stated suspension was required if there was a "critical incident." This incident was an altercation between two senior staff - who both might have been expected to know better. "Critical" is a plain English word meaning, the potential to become disastrous at a point of crisis, and the incident appeared to be no such thing.

162. Dr Harding also relied on there being a breakdown in relations between the claimant and her team. Whilst this was not an unreasonable conclusion, Dr Harding's approach was not even handed. Dr Harding had not considered how to deal with Dr E who had breached Trust rules by videoing her colleague and had behaved unprofessionally.

163. He also stated that keeping the claimant on site might hinder the investigation. The Tribunal was unclear as to his reasoning, and Dr Harding had some difficulty in explaining this. The tribunal understood that he was concerned that the claimant might alter records, although there was no evidence that she had done this or an explanation as to how she might go about it. Further, the approach was, again, not even handed. If the claimant needed to be excluded to avoid her altering records, there was no explanation as to why Dr E was permitted to remain at work and, presumably, able to alter records.

164. Dr Harding also said that the claimant might pose a risk to others. The Tribunal, again, had difficulty in understanding this. Dr Harding had seen the video and knew that there had been a confrontation between two Consultants and the claimant had tapped/touched Dr E's phone whilst being filmed.

165. In the view of the Tribunal, Dr Harding concentrated only on the claimant because he had been asked to investigate the claimant and because Dr O had, in effect, come down on Dr E's side and against the claimant. The incident was referred to Dr Harding by the Divisional Director in respect of the claimant only.

166. In the view of the Tribunal, Dr Harding saw that there was clear dysfunction in the relationship between Dr E and the claimant. Separating Dr E and the claimant was a quick and simple solution. There was an obvious concern that this relationship was deteriorating and things might get a good deal less manageable if they continued to work together. Dr O was backing Dr E. So the claimant, who was the subject of the referral, was the obvious one to be suspended.

167. The Tribunal also considered the second suspension when Dr Harding had agreed to lift the suspension but then changed his mind and extended. His reason was because the evidence indicated at the time that the claimant had put in a second incident report. When the claimant denied it, he therefore disbelieved her. He also assumed that she was not allowed on the premises, despite the fact that her suspension had just been ended. Dr Harding found it difficult to explain to the Tribunal why he was concerned at the claimant coming on site.

168. Nevertheless, the Tribunal accepted that Dr Harding did have some cause for concern. As soon as the claimant's suspension was lifted, she came back on site and put in a second safeguarding report. The only reason it seemed that this second report was submitted was to ensure that the allegation that Dr E had assaulted her was on the safeguarding records. Whilst this did not amount to the claimant manipulating evidence, Dr Harding's concerns about her conduct were to some extent understandable.

169. Nevertheless, on 25 November when he found out the claimant had not submitted the second report and was therefore telling the truth, he did not lift the suspension. He still thought that it felt like she was trying to hinder the investigation and manipulate evidence as shown by him telling her so on 2 January.

170. Further, based on his evidence to the tribunal, Dr Harding also took into account that HR had told him that Dr E was traumatised. In the view of the Tribunal, Dr Harding was under pressure from Dr E and Dr O who said that they were in fear. Dr Harding did not appear to have considered if they were entirely dependable in this matter.

171. The tribunal concluded that the decision to exclude the claimant and then extend the exclusion after 25 November was not a reasonable decision. But this was not the issue – the question for the Tribunal was, did the claimant's protected disclosure about the handover on 13 July have a material impact on Dr Harding's decisions? The Tribunal found that it did not have this impact for the following reasons.

172. Dr Harding suspended because firstly the Divisional Director in her email suggested the disciplinary route and not mediation. This strongly influenced Dr Harding's approach. He started by considering this as a disciplinary matter against the claimant only. Secondly, rightly or wrongly, he had practice of preferring the word of the manager over that of the subordinate. When it came to the extension, he was under pressure from the claimant's colleagues. Put simply, it was easier for Dr Harding to exclude the claimant and extend her exclusion, than to step back and consider if the respondent's approach was even-handed or reasonable.

173. Further, the disclosure about the 13 July handover was far from Dr Harding's focus. The fact that Dr Harding had exaggerated concerns about the claimant (for instance his references to violence) indicated that it was the incident on 30 July, which was the reason he suspended, rather than anything else. The claimant's complaints about the 13 July handover were significantly overshadowed by what Dr Harding considered to be the most important matters - the 30 July incident.

174. Finally, the Divisional Director viewed the 13 July incident as a matter of consultants failing to work together to effect handovers, and it is hard to see why Dr Harding, as a Senior Manager, would be so concerned at a single handover going wrong.

175. The second detriment was Dr Harding stating that the claimant would be dismissed on 2 January 2020. The Tribunal preferred Dr Harding's account, that he had

explained to the claimant that there might be a risk of dismissal, rather than saying she would be dismissed, for the following reasons.

176. The claimant did not make this allegation in her detailed emails following the conversation, in the dismissal meeting, or during the appeal process. Such a statement would be important and the tribunal drew an adverse inference from the claimant's failure to mention it until much later. It was something the claimant would be expected to raise at the time.

177. Such a statement would not be consistent with Dr Harding's general approach. He worked closely with others when making decisions. There was no evidence or indication of him saying anything else which was so notably unprofessional. Such a statement would be "a hostage to fortune" and provide the claimant with a strong case against the respondent. Dr Harding was an experienced manager in MHPS matters. He also believed that the claimant might be trying to manipulate evidence which would make him warier of saying anything inappropriate.

178. Finally, the claimant was understandably upset during this call. It was likely that she was not processing exactly what was said as well as she might, had she been under less emotional pressure. The found tribunal that she heard the word "dismissal" and in effect, leaped to a conclusion.

179. The second part of the second detriment was that in a letter of 17 April 2020 Ms Peskett had threatened the claimant with dismissal. However, there was no such threat in the letter. There was no reference to dismissal in the letter. There was a reference to a charge of gross misconduct and a possible sanction, but nothing more. The tribunal found that this did not amount to a threat to dismiss.

180. The Tribunal considered the third detriment - the decision to subject the claimant to the MHPS investigation.

181. The Tribunal had similar concerns in respect of the decision to initiate MHPS as it did regarding the suspension. Again, there was some difference in treatment between Dr E and the claimant, in that the respondent considered a MHPS investigation against the claimant only. Dr Harding expressed severe reservations about the MHPS process and yet initiated it against the claimant when he knew that the only physical interaction was that the claimant had tapped Dr E's phone with her pencil case. He knew that there were further allegations from Dr O, but that her account of the video was not accurate. He passed on these matters to the PPA who said in effect, 'based on what you say, yes, you should investigate.'

182. However, the tribunal found that the protected disclosure did not have a material impact on his decision for the following reasons. Dr Harding instigated the MHPS for broadly the same reasons as he excluded the claimant. This was how the matter was originally presented to him – as a concern about the claimant. His practice was to prefer the account of a manager to that of a subordinate. Whilst the tribunal did not find that the decision to instigate the MHPS was reasonable in the circumstances,

there was no basis to link it to the disclosure about the handover on 13 July. Dr Harding was not focused on the handover, but on the incident on 30 July.

183. The tribunal saw the decision to proceed to a disciplinary hearing as part of the MHPS detriment. Dr Harding's decision to progress to a disciplinary hearing was arguably harsh, particularly following Dr McCall's findings. Dr McCall had found the claimant did give an inaccurate account, but the claimant believed it at the time, i.e., she had not deliberately misled.

184. In the view of the Tribunal, however, Dr Harding made the decision because he wanted someone else to take ownership of the decision, particularly in light of the pressure from Dr O. Further, the decision to go to a disciplinary was taken in January 2020 and it is even less that Dr Harding would be affected by the claimant's making a disclosure about a single handover on 13 July by this time. In effect, too much water had passed under the bridge since then. Dr Harding's focus was on the 30 July incident and, although Dr McCall had found that the claimant had not deliberately misled the respondent, she had found that the claimant's account was not accurate.

185. The fourth detriment was the written warning.

186. The Tribunal had concerns about the respondent's explanation for why it issued the warning and Ms Peskett's evidence in general. The Tribunal could not understand why Ms Peskett had told the appeal that a written warning was not a sanction. It unquestionably was a sanction. Further, in her witness statement, she said that there was no evidence that Dr E had called the claimant a liar, when she had sight of a text message showing Dr E calling the claimant exactly that.

187. The Tribunal considered whether to draw adverse inferences from Ms Peskett's evidence.

188. Ms Peskett conducted, what appeared to be, a thorough meeting. She heard from both Dr E and from the claimant. She did not view the video because the claimant had specifically said that this should not be done. The claimant called no witnesses to support her account. Whilst Ms Peskett unreasonably rejected some elements of the claimant's – the lying – it was evident that other elements of the claimant's account were not true, for instance, the swearing.

189. The Tribunal did not find that this was a good decision. It was a decision which was not fully supported by the evidence. Ms Peskett made material errors. However, there were grounds for Ms Peskett to reach her conclusion on the information before her. Dr McCall's account established that the claimant's account was inaccurate.

190. The difficulty for the tribunal in drawing the necessary inferences was that Ms Peskett was a new member of staff. She had no links with the 13 July handover or, indeed, to any events between Dr E and the claimant. She came to the matter afresh. She was not a doctor. She was not involved professionally. There was no reason the protected disclosure would have had an impact on Ms Peskett's decision. Ms Peskett

was focused, as shown by the minutes of the meeting, on what happened on 30 July. The tribunal could find no basis to find that the shortcomings in Ms Peskett's decision were linked to the protected disclosure about a single handover 9 months before, in circumstances where the entire focus of the hearing was on the events of 30 July.

191. The claimant made a final and alternative submission, that the tribunal should approach this case in line with the Supreme Court decision in *Royal Mail v*. *Jhuti* [2019] UKSC 55. This was a submission based on the decision makers (Dr Harding and/or Ms Peskett) being manipulated by a person or persons who wanted to victimise the claimant for making the protected disclosure.

192. In *Jhuti* the Supreme Court established that if a person in a hierarchy of responsibility above the claimant determines that for a prohibited reason they should be dismissed, but that reason is hidden behind an invented reason which the decision maker adopts, the tribunal should look at the real reason for dismissal, even if the decision maker is unaware of it.

193. The claimant in effect submitted that the facts in this case were an exception to the general rule that a decision maker must know about the protected disclosure in order for the protected disclosure to have an impact on their decision. In effect, the tribunal should attribute the motivation of a third party – a manipulator – to the decision maker, even if the decision maker was innocent of the proscribed knowledge and/or motivation.

194. *Jhuti* is a case under section 103A of the Employment Rights Act, unfair dismissal in respect of a protected disclosure. The claimant submitted that this reasoning applied to a claim for detriment on the ground of a protected disclosure. The case law on this matter is complex and the claimant's submissions made little reference to it.

195. The EAT had considered this point in a detriment case under section 47B in *Ahmed v City of Bradford Metropolitan District Council and ors EAT 0145/14*. The EAT applied *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA* to find that the employer was liable under s47B when a decision maker was unaware of the disclosure but was influenced by a manipulator who was motivated by the disclosure. *Ahmed* was decided several years before the Supreme Court decision in *Jhuti* and prior to the whistle-blowing provisions being amended to extend liability to a claimant's colleagues under s47B(1A).

196. More recently the EAT under its President in *Malik v Cenkos Securities plc EAT 0100/17* stated that a tribunal could not attribute the knowledge or motivation of another party to the decision maker under section 47B. The EAT made its decision before the Supreme Court decision in *Jhuti.* The President distinguished the Court of Appeal's decision in *Jhuti*. He found that in unfair dismissal a third party's motives can be attributed to the dismissing officer in some circumstances because a claimant cannot make a claim against a fellow employer. A claimant can only proceed against an employer for unfair dismissal. In a claim for detriment a clamant may proceed against a colleague under s47B(1A).

197. This Tribunal considered itself bound by the decision of the EAT in *Malik*. It is a decision of the President. It is the more recent decision of the EAT. It has not been successfully challenged in five years.

198. Further, the difference in an employer's liability in a dismissal and detriment case in a manipulator situation is not irrational because a claimant in a detriment case may bring a claim against the alleged manipulator in person. In the view of the Tribunal, the facts in this case illustrated the practicalities of this distinction.

199. The claimant did not raise the manipulator argument until the Tribunal asked in terms whether the claimant was relying on any such argument. The claimant, if she had believed that Dr O and/or Dr E were manipulating, could have added them as respondents, but she had not. The respondent had not called either Dr E or Dr O as witnesses and they were not present before the tribunal as parties. The respondent was thus at a disadvantage in answering a case that it had, in effect, subjected a whistle blower to detriment on the grounds that Dr E or Dr O, and not the decision-makers, were motivated by the proscribed reason.

200. Further, the Tribunal took into account that the claimant had not made this case until the Tribunal had specifically asked. There was no good reason for the delay. The claimant had been aware of Dr O's email no later than disclosure during proceedings and she was aware of Dr E's conduct at the material time. Finally, the manipulator argument simply did not fit with the rest of the claimant's case. The claimant's main case was that Dr Harding was himself motivated in his decisions by the protected disclosures.

201. Accordingly, the claimant could not succeed in a so-called manipulator argument.

202. Therefore, the Tribunal found that the respondent had not subjected the claimant to any detriment on the ground that she had made a protected disclosure. The case was dismissed.

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Employment Judge Nash
Date: 4 August 2022